U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 33403917

Date: AUG. 29, 2024

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Extraordinary Ability)

The Petitioner, a research scientist, seeks classification as an individual of extraordinary ability. *See* Immigration and Nationality Act (the Act) section 203(b)(1)(A), 8 U.S.C. § 1153(b)(1)(A). This first preference classification makes immigrant visas available to those who can demonstrate their extraordinary ability through sustained national or international acclaim and whose achievements have been recognized in their field through extensive documentation.

The Director of the Texas Service Center denied the petition, concluding the Petitioner did not establish that she meets the initial evidence requirements for this classification, either through her receipt of a major internationally recognized award or by submitting evidence that satisfies at least three of the ten criteria set forth in the regulations. The matter is now before us on appeal pursuant to 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will dismiss the appeal.

I. LAW

An individual is eligible for the extraordinary ability immigrant classification under section 203(b)(1)(A) of the Act if:

- They have extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and their achievements have been recognized in the field through extensive documentation;
- They seek to enter the United States to continue working in the area of extraordinary ability; and
- Their entry offers substantial prospective benefits to the United States.

The term "extraordinary ability" refers only to those individuals in "that small percentage who have risen to the very top of the field of endeavor." 8 C.F.R. § 204.5(h)(2). The implementing regulation

at 8 C.F.R. § 204.5(h)(3) sets forth a multi-part analysis. First, a petitioner can demonstrate a petitioner's one-time achievement (that is, a major, internationally recognized award). If a petitioner does not submit this evidence, then they must provide documentation that they meet at least three of the ten categories listed at 8 C.F.R. § 204.5(h)(3)(i)-(x) (including items such as awards, published material in certain media, and scholarly articles).

Where a petitioner demonstrates that they meet these initial evidence requirements, we then consider the totality of the material provided in a final merits determination and assess whether the record shows sustained national or international acclaim and demonstrates that the individual is among the small percentage at the very top of the field of endeavor. *See Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the documentation is first counted and then, if fulfilling the required number of criteria, considered in the context of a final merits determination); *see also Amin v. Mayorkas*, 24 F.4th 383, 394 (5th Cir. 2022); *Viscinscaia v. Beers*, 4 F.Supp 3d 126, 131-32 (D.D.C. 2013); *Rijal v. USCIS*, 772 F. Supp. 2d1339 (W.D. Wash. 2011).

II. ANALYSIS

The Petitioner claims eligibility for this classification as an individual of extraordinary ability in the biological sciences, specifically in protein biology and molecular biology. The record reflects that she received her Ph.D. in medical microbiology from [redacted] in 2012. Between 2013 and 2022, the Petititioner worked in postdoctoral fellow and research associate positions with [redacted] and at [redacted] At the time of filing, she was employed as a research scientist in the Department of Neurology at [redacted] She indicates her intent to continue her work as a research scientist if granted lawful permanent residence in the United States.

A. Evidentiary Criteria

Because the Petitioner has not indicated or established that she has received a major, internationally recognized award, she must show that she satisfies at least three of the ten regulatory criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x).

The Director determined that the Petitioner submitted evidence related to the criteria at 8 C.F.R. § 204.5(h)(3)(ii), (v), (vi), (viii) and (ix) and concluded she satisfied only one of these criteria. Specifically, the Director found that the Petitioner met her burden to demonstrate her authorship of scholarly articles under 8 C.F.R. § 204.5(h)(3)(vi). However, the Director determined that the Petitioner did not establish her membership in professional associations that require outstanding achievements, her original contributions of major significance in her field, her leading or critical role with organizations that have a distinguished reputation, or her high salary in relation to others in her field.

The record indicates that the Petitioner has authored scholarly articles in professional publications including *Journal of Bacteriology*, *Free Radical Biology and Medicine*, *Microbiological Research*, and *Journal of Alzheimer's Disease*. Therefore, we agree with the Director's determination that the Petitioner satisfied the criterion at 8 C.F.R. § 204.5(h)(3)(vi). Further, although not addressed by the Director, a review of the initial evidence submitted in support of the petition reflects the Petitioner

claimed she has participated as a judge of the work of others in her field, under 8 C.F.R. § 204.5(h)(3)(iv). She provided evidence that she has served as a peer reviewer for the *Journal of Diabetes Research and Therapy*. Therefore, we conclude that the Petitioner has met this additional criterion.

Although the Petitioner submits a brief in support of the appeal, she does not address or contest the Director's determination that she did not meet the criteria at 8 C.F.R. § 204.5(h)(3)(ii) and (v), relating to membership in associations in her field and original contributions of major significance in the field. An issue not raised on appeal is waived. *See, e.g., Matter of O-R-E-*, 28 I&N Dec. 330, 336 n.5 (BIA 2021) (citing *Matter of R-A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012)). Therefore, we will not further address these criteria.

In her brief, the Petitioner asserts that the Director overlooked evidence she submitted in support of the criteria at 8 C.F.R. § 204.5(h)(3)(viii) and (ix). We will discuss her claims and evidence relating to these two criteria below. For the reasons provided, we conclude that the Petitioner has not established that she meets at least three of the criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x).

1. Leading or Critical Role

To determine whether an individual meets the criterion at 8 C.F.R. § 204.5(h)(3)(viii), U.S. Citizenship and Immigration Services (USCIS) first determines whether they have performed in a leading or critical role for an organization, establishment or a division or department of an organization or establishment. For a leading role, we look at whether the evidence establishes that the person was a leader within the organization or a division or department thereof. A title with appropriate matching job duties can help to establish whether the role is leading. For a critical role, we look at whether the evidence establishes that the person has contributed in a way that is significantly important to the outcome of the organization or establishment's activities. *See generally* 6 *USCIS Policy Manual* F.2(B)(1), https://www.uscis.gov/policy-manual (discussing evaluation of initial evidence of extraordinary ability under the criteria at 8 C.F.R. § 204.5(h)(3)). If the evidence demonstrates that the person performed in a leading or critical role, we determine whether the organization or establishment, or the department or division for which the person held a leading or critical role, has a distinguished reputation.

The Petitioner claimed that she served in a critical role as a postdoctoral fellow at the [redacted] in Texas from 2013 to 2014, and in a leading role as a senior research associate with [redacted] from 2016 to 2017.

The Director addressed the Petitioner's role as a postdoctoral fellow for [redacted] and concluded that she did not meet her burden to establish that her role was leading or critical to the organization or to a department or division of the organization. We agree with the Director's conclusion and note that the Petitioner has not contested the Director's determination with respect to this role on appeal. The Petitioner did not submit a letter from this employer or from a person with knowledge of her work with [redacted] to support her claim that her role was significantly important to the outcome of the [redacted] activities. Further, we note the Petitioner herself described her postdoctoral fellow role as a "trainee" position that "participates as a support in ongoing projects under the supervision of a principal investigator." Absent a detailed statement from her former supervisor or

other person familiar with her work at [redacted] the Petitioner did not demonstrate that her performance in this trainee or supporting position was nevertheless critical to the organization's or department's activities during her one-year tenure there.

On appeal, the Petitioner asserts that the Director overlooked evidence relating to her role as a senior research associate at [redacted] She emphasizes that her response to the Director's request for evidence (RFE) included several evidentiary exhibits intended to demonstrate she held a leading role within the university's [redacted] between September 2016 and September 2017.

The Petitioner provided evidence of this employment, which included an internally-prepared position description for the senior research associate position from 2017; an October 2023 letter from [redacted] Human Resources, confirming the Petitioner's dates of full-time employment as a senior research associate, her salary, and her job functions; a July 2016 letter from the director of the [redacted] offering the Petitioner the position of "microbiologist" in the [redacted] Research Laboratory; and a copy of her 2017 IRS Form W-2, Wage and Tax Statement, issued by [redacted]

This evidence indicates that the Petitioner was required to perform some supervisory and technical management functions as a senior research associate. For example, the letter provided by [redacted] human resources department states that, along with her performance of various technical and non-supervisory laboratory functions, she provided "supervisory and direct support of designated approved research efforts involving the [redacted] assisted in the training and supervision of graduate students and laboratory interns and provided operational supervision for the [redacted] Research Laboratory "as needed." However, her job title and duties alone are insufficient to demonstrate how her role was in fact leading to the university or a division or department of the university.

The Petitioner's own statements emphasize the supervisory aspects of her senior research associate role and the importance of the work performed by the laboratories operated by the [redacted] However, as noted by the Director in the RFE, this is one criterion where letters from individuals with personal knowledge of a petitioner's leading or critical role can be particularly helpful, so long as the letters contain detailed and probative information that specifically addresses how the person's role for the organization, establishment, division or department was leading or critical. *See generally* 6 *USCIS Policy Manual*, *supra*, at F.2(B)(1).

Here, the Petitioner did not submit this type of evidence. Neither the submitted position description, the letter from the university's human resources department, nor the job offer letter contained this level of detailed and probative information. Therefore, we conclude that the Petitioner did not meet her burden to demonstrate that she held a leading or critical role as a senior research associate with [redacted] Because the Petitioner did not demonstrate that she held a leading or critical role, we need not determine whether she worked for an organization (or a department or division of an organization) that has a distinguished reputation.

For the reasons discussed, the Petitioner has not established that she meets the criterion at 8 C.F.R. § 204.5(h)(3)(viii).

2. High Salary

To satisfy the criterion at 8 C.F.R. § 204.5(h)(3)(ix), the Petitioner must demonstrate that her salary or remuneration is high relative to the compensation paid to others in the field. To determine whether a person's compensation is high relative to others, USCIS will consider comparative evidence, such as geographical or position-appropriate compensation surveys. *See generally* 6 *USCIS Policy Manual*, *supra*, at F.2(B)(1).

The Director determined that the Petitioner did not demonstrate her eligibility under this criterion, noting that her supporting evidence was limited to a copy of one IRS Form W-2 and copies of several job offer letters. On appeal, the Petitioner asserts that the Director overlooked additional evidence she provided in response to the RFE. We have considered this additional evidence, and for the reasons discussed below, conclude that the record does not demonstrate she meets this criterion.

The Petitioner initially submitted copies of offer letters and recommendation letters from [redacted] and from her current employer, which stated her annual salaries with these employers. In the RFE, the Director advised the Petitioner that she should submit additional evidence of her salary or other remuneration, such as copies of her IRS Forms W-2 or 1099. The Director also informed the Petitioner that she should provide evidence that allows for a comparison between her compensation and that of others working in the field, such as geographic or position appropriate compensation surveys, media reports of notably high salaries in the field, or information from the U.S. Department of Labor (DOL).

In response to the RFE, the Petitioner submitted:

- Copies of her IRS Forms W-2 for the years 2017, 2019 and 2020.
- An online article titled "Postdoc payday: Salaries for fellows are on the up" published by *New Scientist* on May 8, 2023.
- An announcement issued by National Institutes of Health (NIH) on November 7, 2016, titled "Adjustment to Stipend Levels for Postdoctoral Trainees and Fellows on Ruth Kirschstein National Research Service Awards (NRSA)."
- A letter from [redacted] informing the Petitioner that she would be receiving an annual salary of $51,360 in fiscal year 2019, an increase from $48,000 in 2018.
- Copies of DOL Forms ETA 9035, Labor Condition Application for Nonimmigrant Workers (LCA), previously submitted in support of H-1B nonimmigrant petitions filed by [redacted] on the Petitioner's behalf in 2015 and 2018.
- Postdoctoral salary information from Salary.com.

The Petitioner asserted this evidence demonstrates that her salary as a postdoctoral research associate has been consistently "above average." While the record may support that claim, the regulation requires that the Petitioner demonstrate that she has commanded a "high salary" or other significantly high remuneration in relation to others working in the same occupation and field, rather than an "above average" salary.

The salary data published by *New Scientist* and NIH only reports figures for postdoctoral researchers employed by NIH and therefore does not provide a sufficient basis for comparison for similarly

employed workers in the field or in the Petitioner's specific geographic area. In addition, the entry-level "level 1" prevailing wage data reported on the submitted DOL-certified LCAs similarly does not provide insight into what constitutes a "high salary" for similarly experienced workers in the Petitioner's field.

The information the Petitioner submitted from Salary.com includes data that is specific to both the Petitioner's occupation and geographic area of employment. However, this data does not demonstrate that she has commanded a "high salary." This evidence states that the "average base salary" for a postdoctoral researcher in [redacted] Texas is $48,025, but reports a range that extends up to $57,954. The Petitioner's last position located in [redacted] paid a salary that was closer to the "average" figure. Further, it appears that Salary.com relies on user-reported salary data, which may not provide a valid or accurate comparison, if, for example, too few users reported their salaries.

In summation, while the Petitioner has documented her earnings as a postdoctoral research associate and provided some evidence in support of her claim that she has earned an above average salary, she did not demonstrate that she has earned a "high salary" or "significantly high remuneration" as required by the plain language of 8 C.F.R. § 204.5(h)(3)(ix). Accordingly, she did not establish that she meets this criterion.

B. Final Merits Determination

As noted, the Director discussed evidence the Petitioner submitted relating to five of the ten evidentiary criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x) and concluded that she satisfied only one criterion. Based on the foregoing discussion, the Petitioner has demonstrated that she meets the criteria at 8 C.F.R. § 204.5(h)(3)(iv) and (vi) but has not demonstrated that she satisfies a third criterion as necessary to satisfy the initial evidence requirements for this classification under 8 C.F.R. § 204.5(h)(3). As a result, it is not necessary to provide the type of final merits determination referenced in *Kazarian*, 596 F.3d at 1119-20.

However, despite concluding that the Petitioner did not satisfy the initial evidence requirements, the Director included the following statement on the final page of the decision:

> USCIS has evaluated the evidence on an individual basis and determined that the evidence does establish that the [petitioner] meets at least three of the ten criteria found at 8 C.F.R. [§] 204.5(h)(3). USCIS has then examined the entire record and has determined that the [petitioner] is not one of that small percentage who have risen to the top of the field of endeavor. Furthermore, the evidence does not show that the [petitioner's] achievements set him [*sic*] significantly above almost all others in the field at a national or international level and does not establish sustained acclaim.

On appeal, the Petitioner asserts that this "final merits determination" was inadequate, as the Director did not explain why the evidence was insufficient to establish her sustained national or international acclaim and her placement among the small percentage at the top of her field of endeavor. However, when read in context with the preceding pages of the decision, the Director's statement that "the evidence does establish that the petitioner meets at least three of the ten criteria" appears to be a typographical error, rather than a conclusion that the Petitioner had in fact met the initial evidence

requirements for this classification. As such, the typographical error was, at most, harmless. *See generally Matter of O-R-E-*, 28 I&N Dec. 330, 350 n.5 (BIA 2021) (citing cases regarding harmless or scrivener's errors). When read its entirety, the Director's decision clearly explained why the evidence did not establish that the Petitioner met at least three of the ten criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x). As the Petitioner did not meet this requirement, the Director was not required to conduct a final merits determination. Thus, the Petitioner has not established that the Director's error was prejudicial to the outcome of her case.

Nevertheless, we advise that we have reviewed the record in the aggregate and conclude it does not support a finding that the Petitioner has established the acclaim and recognition required for the classification sought.

The Petitioner seeks a highly restrictive visa classification. USCIS has long held that even athletes performing at the major league level do not automatically meet the "extraordinary ability" standard. *Matter of Price,* 20 I&N Dec. 953, 954 (Assoc. Comm'r 1994). Here, the Petitioner has not shown that the significance of her work is indicative of the required sustained national or international acclaim or that it is consistent with a "career of acclaimed work in the field" as contemplated by Congress. H.R. Rep. No. 101-723, 59 (Sept. 19, 1990); *see also* section 203(b)(l)(A) of the Act. Moreover, the record does not otherwise demonstrate that the Petitioner has garnered national or international acclaim in the field, and that she is one of the small percentage who has risen to the very top of the field of endeavor. *See* section 203(b)(1)(A) of the Act and 8 C.F.R. § 204.5(h)(2). Although the Petitioner has reviewed manuscripts, conducted research, published her work, joined associations in her field, and received some recognition from other researchers in the form of citations, the record does not contain sufficient evidence establishing that she is among the upper echelon of research scientists in her field.

III. CONCLUSION

For the reasons discussed above, the Petitioner has not demonstrated her eligibility as an individual of extraordinary ability. The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision.

ORDER: The appeal is dismissed.